86-1000

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RODNEY WHEELER, et al.

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Were federally employed civilian firefighters wrongfully denied overtime wages under the Fair Labor Standards Act, 29 U.S.C. sections 201, et seq.?

PARTIES TO THE PROCEEDING

This action involves 2187 plaintiffs. Their names are listed in Appendix D, filed herewith. The defendant is the United States of America.

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OPINIONS BELOW

The decision of the United States Court of Appeal for the Federal Circuit in the case of Rodney Wheeler, et al. v. United States of America, No. 86-1043 was not published. This decision appears in Appendix A filed herewith. The decision of the United States Claims Court in the case of Rodney Wheeler, et al. v. United States of America, No. 528-82 C, was published at 9 Cl.Ct. 579 (1986). This decision appears in Appendix B as pages 1 through 30. The Memorandum Decisions, Orders and Judgment of the Untied States District Court in the case of Rodney Wheeler, et al. v. United States of America, No. CV-80-4512 AWT, were not published. These items appear in Appendix B as pages 31 through 58. The judgment sought to be reviewed is attached as Appendix C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was entered on September 18, 1986. A Petition for Writ of Certiorari to review the decision of a Federal Court of Appeals in a civil case can be filed with this court within ninety (90) days of entry of judgment. 28 U.S.C. section 2101(c). The jurisdiction of this court to review by Writ of Certiorari the decision of a Federal Court of Appeals in a civil case is invoked pursuant to 28 U.S.C. section 1254(1).

THE STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 207. Maximum Hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . .

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement

activities (including security personnel in correctional institutions) if

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the less of of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975;

. . .

Compensation at a rate not less than one an one-half times the regular rate at which he is employed.

D. Computation of Overtime Pay Entitlement - FLSA

1. Computation of "Regular Rate" - FLSA

An employee's regular rate of pay must first be determined in order to compute his overtime pay entitlement under the FLSA. Section 7(e) of the FLSA requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except for certain specific exclusions. Premium pay on an annual basis for regularly scheduled standby duty (5 U.S.C. 5545(c)(1)) and premium pay on an annual basis for administratively uncontrollable work (5 U.S.C. 5545(c)(2)) do not qualify as statutory exclusions from the "regular rate" and therefore, they are include in computing an employee's total remuneration.

The employee's hourly "regular rate" is then determined by dividing the employee's total remuneration for employment in any work period by the total number of hours in the employee's tour of duty under the FSLA (all hours actually on duty including scheduled and unscheduled periods).

Regular Rate =

$$\frac{\text{Total Remuneration for the Work Period}}{\text{Tour of Duty}}$$

The regular rate of pay at which the employee is employed shall in no event be less than the statutory minimum specified under section 6 of the FLSA. (See attachment 3 to FPM Letter 551-1 for the appropriate minimum wage rates).

2. Computation of Overtime Pay - FLSA

Once an employee's hourly "regular rate" is determined, the employee is then entitled to additional compensation at a rate of one-half times the "regular rate" for each

hour the employee's tour of duty exceeds the maximum hours limitation of section 7(k) of the FLSA.

Additional = ½ X Regular Rate X Number Of Overtime Hours Compensation

NOTE: The employee's additional compensation for overtime work is computed at one-half times the "regular rate" and not one and one-half times the "regular rate" for all overtime hours under the FLSA. A simple explanation is that in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all hours in his tour of duty. Therefore, once the employee's "regular rate" is computed, the employee is then entitled to additional compensation of 50 percent times his "regular rate" for those hours in excess of the maximum hours limitation of section 7(k) of the FLSA. This method of computing an employee's overtime

entitlement under the FLSA results in the employee being compensated for overtime work at a rate of "one and one-half times the regular rate at which he is employed."

STATEMENT OF THE CASE

Plaintiffs are federally employed civilian firefighters. They are employed at various military and federal installations throughout the United States, its protectorate territories and foreign bases. Their usual tour of duty consists of twelve shifts of 24 hours in a twenty-eight day work period for a total of 288 hours.

The parties agree that under the Fair Labor Standards Act (29 U.S.C. sections 201, et seq. as amended), plaintiffs are entitled to 1½ times their regular rate of pay for all hours worked in excess of 212 hours in a 28 day period. See 29 U.S.C. section 207(k) (1982). Thus, plaintiffs should receive overtime wages for 76 hours per month.

In order to compute this overtime pay, it is first necessary to determine plaintiffs "regular rate" of pay, since

overtime is 1½ times this "regular rate." This is where the parties disagree.

Under a long line of United States Supreme Court cases, an employee's regular rate of pay is the hourly rate paid for the normal non-overtime work week. See, e.g., Walling v. Helmerick & Payne, Inc., 323 U.S. 37, 40 (1944); Walling v. Youngerman - Reynolds Hardwood Company, 325 U.S. 419, 424 (1945). Accordingly, plaintiffs' regular rate of pay should be computed by dividing their total compensation by the non-overtime hours worked.

In the case of Mr. Wheeler, a GS-4 Step 6 employee in 1980, this would mean $1104 divided by 212 hours = $5.2075 per hour. Mr. Wheeler would then obtain overtime pay of 1½ x $5.0725 x 76 overtime hours = $578.27, for a total monthly compensation of $1682.27.

The United States disagrees and argues that Mr. Wheeler's regular rate is arrived

at by dividing his total compensation by all hours worked, whether overtime or non overtime. Thus, $1104 divided by 288 = $3.833 per hour. See FPM 551-5, Attachment 2.

It is imperative to note that this method of computation directly resulted in certain plaintiffs receiving less than the statutory minimum wage as directed by 29 U.S.C. section 206. These plaintiffs were awarded money damages by the District Court for these minimum wage violations. See Appendix B, pages 35, 39, 40, 43.

The United States further compounds this error by asserting that Mr. Wheeler's overtime rate is only one-half x $3.833 x 76 overtime hours which yields $145.654. The United States argues that Mr. Wheeler has already been compensated one time for the 76 overtime hours since it was included in determining his regular rate. See FPM 551-5, Attachment 2. Under the Govern-

ment's method of computation, Mr. Wheeler received total monthly compensation of $1249.65.

The issues are therefore (1) whether plaintiffs regular rate of pay is computed by dividing their compensation by all hours worked as opposed to non overtime hours; and (2) whether plaintiffs' regular rate of pay is multiplied by 1½ times or only ½ times to obtain their overtime rate of pay.

JURISDICTION IN THE COURTS BELOW

Jurisdiction in the United States District Court and the United States Claims Court was invoked pursuant to 29 U.S.C. section 201, et seq. and 28 U.S.C. sections 1337, 1346(a)(2), 2201 and 2202.

ARGUMENT IN SUPPORT OF GRANTING THIS WRIT

A. The Decision Of The Court Of Appeals For The Federal Circuit Is In Conflict With The Ninth Circuit Court Of Appeals.

In 1982 the Ninth Circuit Court of Appeals decided the case of Oliver v. Mercy Medical Center, Inc., 695 F.2d 379 (1982). In that action, the employer used the same method of computing the employees' regular and overtime rates of pay as that advanced by the government here. The court unanimously ruled that this method of pay was not in accordance with the Fair Labor Standards Act. 1/

1/ Although Oliver involved a non-federal employee, its holding is applicable to all employees covered by the Fair Labor Standards Act. The fact that certain federal employees such as petitioners receive premium pay for hardship and standby duty is irrelevant since such premium pay is included and considered when determining the employees regular rate of pay. See FPM 551-5 attachment 2.

The court did note that in certain limited instances, a fixed salary for fluctuating hours is permissible under 29 CFR section 778.114(a). However, this is not permissible where it will result in payment of less than the minimum wage or where there is not a clear mutual agreement between the parties. In this case, these issues were briefed and argued in the courts below. The District Court specifically found that the government's method of computing plaintiffs' regular rate did indeed violate the minimum wage laws. Nonetheless, the Claims Court and the Court of Appeals for the Federal Circuit have upheld the government's method of computing plaintiffs' regular rate.

Because of this conflict in the circuits, this writ should be granted.

B. The Decision Of The Court Of Appeals For The Federal Circuit Is In Conflict With The Decisions Of This Court.

As noted above, the cases of Walling v. Youngerman Reynolds Hardware Company, 325 U.S. 419 (1945) and Walling v. Helmerick & Payne, Inc., 353 U.S. 37 (1944) clearly state that the regular rate is an hourly rate paid for the normal non-overtime work week only.

Here the government contends that the regular rate is computed as an hourly rate on the basis of the non overtime work week, as well as the overtime work week. The government further contends that plaintiffs are only entitled to overtime at ½ times their regular rate and not 1½ times, since plaintiffs have already been paid once for those overtime hours when computing the regular rate. See FPM 551-5, Attachment 2.

Therefore, by its own admission, the government has computed and paid plaintiffs' regular rate as an hourly rate for both the non overtime a well as overtime work week. This result is contrary to the precedents of this Court.

Furthermore, in those limited instances where this Court has held that this method of computing the regular rate is appropriate, it was only in the special factual context of a fluctuating work week where the parties have a clear mutual agreement that such would be the case. Walling v. Helmerick & Payne, Inc., supra; Walling v. A.H. Belo Corporation, 316 U.S. 624 (1942); Overnight Motor Transport Company v. Missel, 316 U.S. 579 (1942). No evidence of such a contractual agreement was adduced in this case in the courts below and the judgment appealed from cannot be sustained on that basis. The decision is therefore in conflict with the

applicable decisions of this Court.

Because the decision of the Court of Appeals for the Federal Circuit is inconsistent with the prior decisions of this Court, this writ should be granted.

C. This Case Involves An Important Question Of Federal Law.

At the present time, there are thousands of federally employed civilian firefighters in addition to those who are parties to this case that will be affected by this decision. Additionally, there are thousands of federally employed law enforcement personnel which are subject to the Fair Labor Standards Act and therefore the decision under review. Furthermore, because of this Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 471 U.S. 1049 (1985), all state and municipal firefighters and law enforcement personnel are subject to the

Fair Labor Standards Act and therefore the pay computations currently under consideration by this Court.

Because of the broad reaching and all pervasive effect of this case, and because of this Court's recent expansion of the coverage of the Fair Labor Standards Act to state and municipal employees, the issues presented by this case will deeply affect a huge segment of our society. These individuals are entrusted with protecting us from calamity, disaster, crime and destruction and it should be incumbent upon us to insure that their compensation is in accordance with law and is appropriate to the life protecting functions in which they engage.

This important question of federal law should be settled by this court.

CONCLUSION

Because the decision of the Court of Appeals for the Federal Circuit is in conflict with the Ninth Circuit Court of Appeals, and is further in conflict with the prior decisions of this Court, and because this case presents an important question of federal law which affects not only federal employees but state and municipal employees, it is respectfully requested that this Honorable Court grant this petition for Writ of Certiorari.

Dated: December 15, 1986

Respectfully submitted,

Thomas Dean Wise

THOMAS DEAN WISE
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Thomas Dean Wise, a member of the Bar of the Supreme Court of the United States and counsel of record for Rodney Wheeler, et al., petitioners herein, hereb certifies that on December 15, 1986 pursuant to Rule 28, Rules of the Supreme Court of the United States, I served three (3) copies of the foregoing Petition For Writ Of Certiorari together with three (3) copies of the Appendix thereto, on each of the parties herein by placing three (3) true copies thereof enclosed in a sealed envelope with postage thereon fully prepai in the United States mail at Santa Barbara California, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

Dated: December 15, 1986

Thomas D Wise

THOMAS DEAN WISE

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-1000

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RODNEY WHEELER, et al.

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES UNITED COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Attorney for Petitioner

APPENDIX "A"

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the Federal Circuit

RODNEY WHEELER, ET AL.,	)	
	)	
Appellants	)	
	)	
v.	)	Appeal No.
	)	86-1043
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

ORDER

The United States has moved for summary affirmance of the summary judgment granted by the Claims Court to the United States in reliance on this court's decision in Zumerling v. DeVine, 769 F.2d 745 (Fed. Cir. 1985). The United States relies on that decision of this court as support for its motion.

Wheeler, et al., (Wheeler), opposes the motion, alleging that Zumerling was

wrongly decided because (a) it is in conflict with Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945) and Oliver v. Mercy Medical Center, 695 F.2d 379 (9th Circ. 1982); and (b) because the court in Zumerling relied on regulations not applicable to the present fact situation.

We find no conflict between Zumerling and the authorities cited. Nor do we find that the discussion of regulations in Zumerling (which included one of the two cited in Wheeler's opposition) distinguishes the holding in Zumerling from that of the Claims Court in this case.

ACCORDINGLY, IT IS ORDERED:

That the Motion is granted.

FOR THE COURT

Date: 18 Sep 1986 /s/
Howard T. Markey

cc: Thomas D. Wise, Esq.
Robert A. Reutershan, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
Sep 19, 1986
Francis X. Gindhart
Clerk.

APPENDIX "B"

CORRECTED COPY

In the United States Claims Court

No. 528-82C

(FILED: February 3, 1986)

RODNEY WHEELER, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Civil Pay; Regular Rate of Pay; Overtime Compensation for Federal Firefighters; OPM Letter 551-5 (Overtime Compensation.)

Thomas D. Wise, Santa Barbara, California, for plaintiffs.

Robert A. Reutershan, with whom were Assistant Attorney General Richard K. Willard and David M. Cohen, Washington, D.C., for defendant. Joseph G. Lynch Department of the Navy and John Salter, Office of Personnel Management, of counsel.

OPINION

TIDWELL, Judge

This is a civilian pay case which comes before this court on Plaintiffs' Motion for Summary Judgment and Defendant's Motion to Dismiss. Plaintiffs bring this lawsuit pursuant to 29 U.S.C. section 216(b) and 28 U.S.C. section 1491 (1982), alleging that defendant erroneously computed their "regular rate" and "overtime rate" of pay resulting in the underpayment of wages which plaintiffs allege they were lawfully entitled to receive. After a careful examination of the pleadings and the submitted papers, the court concludes that there are no genuine issues as to any fact material to the question of liability,

and that defendant is entitled to a judgment as a matter of law.

FACTS

Plaintiffs in this action are either current or former federally employed civilian firefighters who are or were based at various military installations throughout the United States, its protectorate territories and certain foreign bases. Since the commencement of this action, more than 2,000 individual firefighters have filed consents with this court to become plaintiffs.

Plaintiffs filed their original Complaint in the United States District Court for the Central District of California on October 9, 1980. That complaint set out four claims. In their first claim, plaintiffs alleged that defendant's method of computing overtime compensation was erroneous, due to an

improperly computed "regular rate" of pay, and thus, defendant has failed to pay plaintiffs the required overtime wage of one and one-half times their "regular rate" in violation of sections 7(a) and 7(k) of the Fair Labor Standards Act (hereinafter referred to as FLSA), 29 U.S.C. section 207(a) and 207(k) (1982). Plaintiffs also alleged that they were entitled to interest, liquidated damages, attorneys' fees and costs under section 16(b) of the FLSA, 29 U.S.C. section 216(b) (1982). 1/

Plaintiffs alleged in their second claim that since October 15, 1977, plaintiffs have been paid less than the applicable minimum wage in violation of section 6 of the FLSA, 29 U.S.C. section 206 (1982).

1/ This specific request for relief is also made in connection with plaintiff's second claim.

In their third and fourth claims, plaintiffs alleged that because they had been paid overtime compensation on an incorrect basis, they had been denied equal protection of the laws in violation of the Fifth Amendment as compared to other general schedule employees of defendant.

The parties filed cross-motions for summary judgment in the United States District Court. Defendant's Cross-Motion for Summary Judgment was denied and plaintiffs' Motion for Summary Judgment was granted on their second claim. However, claims one, three and four were found to be within the exclusive jurisdiction of this court. Pursuant to Order of the United States District Court for the Central District of California, plaintiffs' remaining claims were transferred to this court and on February 28, 1983, plaintiffs adopted their original Complaint from the District Court as their Complaint in this

court.

On April 21, 1983, plaintiffs moved to retransfer their remaining claims back to the United States District Court for the Central District of California. After hearing oral argument on the motion this court issued an Order on October 27, 1983, which held that jurisdiction was properly before the United States Claims Court for plaintiffs' first, third and fourth claims and, denied accordingly, Plaintiffs' Motion to Retransfer.

Plaintiffs' first, third and fourth claims are now before this court on Plaintiffs' Motion for Summary Judgment and Defendant's Motion to Dismiss.

DISCUSSION

The typical general schedule (GS) employee is scheduled for a 40-hour workweek and is on duty for all working hours. In contrast, plaintiffs here

typically work six 24-hour shifts, or 144 hours, in every 14-day work period, but are on duty for only eight hours of each 24-hour shift. The remaining 16 hours are standby time where the firefighters may do as they please within the confines of the duty area. After recognizing that plaintiffs' work schedule differed from those of typical government employees, Congress enacted 5 U.S.C. section 5545 (1982), which sets forth the compensation for a federally employed firefighter. Under section 5545, a firefighter receives basic pay on a weekly basis, computed by dividing the yearly GS pay by 2,080 hours, 2/ and "premium pay" of up to 25 percent of the basic GS pay. This pay structure,

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2/ The number of hours worked in a year during the usual eight hour day, 40 hour workweeks, i.e., 52 weeks multiplied by 40 hours per week.

doubled to compensate firefighters for their full 144-hour biweekly work period, existed prior to the FLSA 1974 Amendments mandating overtime compensation rates for federal firefighters.

It was not until the passage of the FLSA Amendments of 1974, Pub. L, 93-259, 88 Stat. 55 (April 8, 1974) that the federal government, as an employer, became subject to the FLSA. Under the FLSA, most federal employees who receive overtime pay are compensated under section 207(a), which provides that no employer shall employ any employees for a longer workweek than 40 hours, unless they receive compensation at a rate not less than one and one-half times the regular rate for such excess hours of work.

However, section 7(k) was added to the FLSA, effective January 1, 1975 for federally employed firefighters, which provided for an exception to section 7(a)

for employees of a public agency engaged in fire protection activities. It was codified in 29 U.S.C. as section 207(k) and provided in pertinent part that:

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities...if--

(1) in a work period of 28 consecutive days the employee receives four tours of duty which in the aggregate exceed 240 hours; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives four tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. section 207(k) (1975).

Effective January 1, 1976, "240 hours" in section 7(k) became "232 hours"; on January 1, 1977 "216 hours", and subsequently "212 hours" for 1978 and thereafter.

The legislative history shows that the overtime pay provisions of the FLSA applicable to the federal firefighters differ significantly from the FLSA overtime pay provisions for most other federal employees. For example, federal firefighters were exempted from the overtime pay provisions of the Act prior to January 1, 1975, while other federal employees gained entitlement to overtime compensation after May 1, 1974. Also, section 7(k) of the FLSA adopted a new standard for federal firefighters by

enabling the employer to utilize "work periods" of not more than 28 days in determining the firefighters' entitlement to overtime pay, while the general overtime provision requires the computation of FLSA overtime entitlement for each "workweek". Under section 7(k), a firefighter's "overtime" pay is calculated based on tours of duty in excess of a statutorily defined maximum work period, while other federal employees covered by the FLSA are entitled to overtime pay for hours worked in excess of a 40-hour workweek.

Until 1974, the Wage and Hour Division in the Department of Labor had the sole responsibility for administering the FLSA. However, the 1974 amendments provided that the Civil Service Commission (now the Office of Personnel Management) would be responsible for administering the FLSA with

respect to most federal employees. 3/

Pursuant to its statutory authority, the Civil Service Commission issued Federal Personnel Manual (FPM) Letter 551-5, entitled "Instructions for Applying the Fair Labor Standards Act (FLSA) to Federal Employees Engaged in Fire Protection Activities or Law Enforcement Activities," dated January 15, 1975. FPM Letter 551-5 included detailed guidelines for computing overtime pay for federal firefighters pursuant to section 7(k) of the FLSA. In implementing its own procedures for complying with the FLSA, defendant followed the instructions contained in FPM Letter 551-5. It is this compliance and

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3/ The Civil Service Commission was replaced for purposes of the administration of the FLSA in the federal sector by the Office of Personnel Management (OPM) on January 1, 1979. In the private sector, administrative authority to enforce the FLSA lies with the Department of Labor.

computation method which plaintiffs challenge in this action.

I.

In their first claim, plaintiffs contend that FPM Letter 551-5 does not properly implement the provisions of section 7(k) of the FLSA which establishes the FLSA overtime pay entitlement of federally employed firefighters.

Plaintiffs argue that their overtime compensation was not determined in accordance with section 7(k) in two respects. First, plaintiffs' claim that defendant improperly computed their "regular rate" of pay and second, plaintiffs claim that they have been paid only one-half times their regular rate of pay for overtime hours, instead of the one and one-half times their regular rate required by section 7(k). As a result of these alleged violations of the FLSA, the plaintiffs contend that they are entitled

to additional overtime compensation.

In order to evaluate plaintiff's claim, it is necessary to examine the parties' differing methods of computation. The court will first review defendant's method of computing regular pay and overtime pay pursuant to FPM Letter 551-5 as promulgated by the OPM, and then review plaintiffs' overtime and regular rate challenges.

Because the FLSA provides that employees must be compensated for overtime at the rate of one and one-half times their "regular rate", it is necessary to determine an employee's regular rate before computing the amount of overtime compensation due under the FLSA. Section 7(e) of the FLSA defines "regular rate" broadly "to include all remuneration for employment paid to, or on behalf of, the employee", with the exception of certain statutory exclusions. 29 U.S.C. section

207(e) (1982). According to FPM Letter 551-5, Attachment 4, the hourly regular rate is determined by dividing the total remuneration (including premium pay on an annual basis for regularly scheduled standby duty) by the number of hours in the tours of duty. Attachment 2 further provides that the regular rate shall not be less than the statutory minimum pay specified in Section 6 of the FLSA, 29 U.S.C. section 206 (1982). Thus, in addition to their basic pay, federal firefighters are entitled to premium pay for duty in a standby status which, by statute, is not to exceed 25% of their basic pay. 4/ This formula for computation of the regular rate is

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4/ In count number two, the United States District Court found that some firefighters were receiving pay below the minimum wage, even with the 25% premium or standby pay added to the basis pay.

contained in FPM Letter 551-5, Attachment is as follows:

$$\text{Regular Rate} = \frac{\text{Total Remuneration for the Work Period}}{\text{Tour of Duty}}$$

Thus, for a GS-4, step 6, firefighter in 1980 (i.e., the grade and level of Mr. Wheeler in 1980), the regular rate would b computed as follows:

$$\frac{\$451.20 \text{ (Basic Pay)} + \$100.80 \text{ (Premium Pay}}{144 \text{ hours (Two-week tour of duty)}}$$

= $3.8333/Hr. (Regular Rate)

Overtime is mandated by FLSA Section 7(k) for all hours over the 108 average prescribed in section 7(k). 5/ Section 7(k) requires that the plaintiffs receive compensation for overtime at the rate of a least one and one-half times their regular

---

5/ As noted previously, the 108 hour figure was reduced to 106 hours for 1978 and thereafter.

rate. The OPM has construed this as meaning that when the plaintiffs work overtime, they are to receive as compensation their regular rate plus one-half of their regular rate as follows:

Overtime Pay =

½ x Regular Rate x Overtime Hours

The multiplier of one-half the regular rate is a reflection of the fact that firefighters are already paid under Title 5 of the United States Code independently of the FLSA for each hour of their 144 working hours. Thus, the one-half pay in addition to the regular pay amounts to the one and one-half rate mandated by Section 7(k).

Thus, a GS-4, step 6 employee who worked 36 hours overtime in a two-week period (i.e., the number of hours Mr. Wheeler worked during the majority of 1980), would receive:

½ x $3.8333 (Regular Rate) x 36 (Overtime Hours) = $69.00 (Overtime Pay)

Thus, the total pay for the employee would be $621.00, computed as follows:

Basic Pay	$451.20
Premium Pay	100.80
Overtime Pay	+ 69.00
Total Pay	$621.00

Plaintiffs assert that the OPM's calculation of the regular rate is in error in that the denominator of the formula should be 80 hours (i.e., the number of non-overtime hours in a two-week pay period (2 weeks multiplied by 40 hours per week) in accordance with 5 U.S.C. section 5504(b) (1982)). Thus, plaintiffs contend that the regular rate would be computed as follows:

$$\frac{\$451.20 \text{ (Basic Pay)} + \$100.80 \text{ (Premium Pay)}}{\text{(80 hours (two forty-hour weeks))}}$$

= $6.90/Hour (Regular Rate)

Plaintiffs contend that overtime should be at the rate of one and one-half

times this hourly regular rate of $6.90/hour as follows:

1½ x $6.90 (Regular Rate) x 36 (Overtime Hours) = $372.60 (Overtime Pay)

Thus, the total pay for the employee would be $924.60, computed as follows:

Basic Pay	$	451.20
Premium Pay		100.80
Overtime Pay	+	372.60
Total Pay	$	924.60

The dollar difference between plaintiffs' method and defendant's method (i.e., $924.60 - 621.60 = $303.60), represents the dollar difference in the overtime computation only (i.e., $372.60 - 69.00 = $303.60), and is not from any dollar difference in the basic pay or premium pay. In other words, the "regular rate" only becomes important when plaintiffs work overtime hours because in the absence of overtime, plaintiffs' method

does not produce a different amount of total pay from that computed using defendant's method (i.e., basic pay is $451.20 and premium pay is $100.80 for a total pay of $552.00).

In the alternative, plaintiffs assert that the proper method of computing the "regular rate" of pay is to divide the total remuneration by the statutory average tour of duty as found in section 7(k) of the FLSA as follows:

$$\frac{\$451.20 \text{ (Reg. Pay)} + \$100.80 \text{ (Overtime Pay)}}{106 \text{ Hours (Statutory Non-Overtime Hours)}} = \$281.21 \text{ (Overtime Pay)}$$

Thus, the total pay under plaintiffs' alternative method of computation would be $833.21, computed as follows:

Basic Pay	$	451.20
Premium Pay		100.80
Overtime Pay	+	281.21
Total Pay	$	833.21

Here again, the dollar difference between plaintiffs' alternative method and defendant's method (i.e., $833.21 - 621.00 = $212.21), represents the dollar difference in the overtime computation only (i.e., $281.21 - 69.00 = $212.21), and is not from any dollar difference in the basic pay or premium pay. Again, the "regular rate" only becomes relevant when plaintiffs work overtime because in the absence of overtime, plaintiffs' method does not produce a different amount of total pay from that computed when using defendant's method (i.e., basic pay is $451.20 and premium pay is $100.80 for a total pay of $552.00).

In comparing the calculations, the court notes that plaintiffs did not take issue with the numerator as used by defendant in following OPM's method of calculating the "regular rate". The only difference in the computations is the

figure in the denominator. The defendant used 144 hours (two-week Tour of Duty) and plaintiffs contended that it would be more accurate to use 80 hours (two forty-hour weeks) or, in the alternative, to use 106 hours (Statutory Non-Overtime Hours) as the denominator.

Having reviewed the various methods of computation proposed by the parties, the court is convinced that the OPM's method of computation is both reasonable and consistent with the FLSA and the intent of Congress. The United States Court of Appeals for the Federal Circuit has so held in Zumerling v. DeVine, 769 F.2d 745, 749 (Fed. Cir. 1985). In making this determination, the court considered the cases cited by the firefighters and found that they do not support a contrary result.

In Zumerling, the Court was faced with the identical issue presented before this court in plaintiffs' first claim. In

ruling on the merits, the Court of Appeals for the Federal Circuit noted that while, in general, the Secretary of Labor has been given the responsibility to administer the FLSA, section 4(f) of the FLSA provides that the Director of the OPM is authorized to administer the FLSA provisions with respect to any individual employed by the United States. Thus, the court concluded that the OPM had been given the power to interpret the FLSA and to set forth guidelines and policies and that by promulgating FPM Letter 551-5, the OPM had met the challenge given it by Congress. Id. at 753.

Having satisfied itself that the Court of Appeals for the Federal Circuit reached a correct conclusion in Zumerling and that plaintiffs in the instant case have failed to distinguish their case from the facts in Zumerling, this court is compelled to

follow the conclusion reached by the Federal Circuit, i.e., that the OPM's interpretation "harmonizes with the statute's origin and purpose" and is consistent with the intent of Congress. Id. at 750. Accordingly, defendant's Motion to Dismiss is granted and plaintiffs' Motion for Summary Judgment is denied as to plaintiffs' first claim.

II.

In their third and fourth claims, plaintiffs allege that because they were paid overtime compensation on an incorrect basis, they have been denied equal protection of the law in violation of the Fifth Amendment as compared to other general schedule employees of defendant. However, because the first claim has been found to be without merit and judgment on that claim has been granted in favor of defendant, plaintiffs' third and fourth claims are likewise without merit.

Zumerling also dealt with this exact issue. In response to appellants' identical equal protection argument in Zumerling, the Court of Appeals for the Federal Circuit concluded:

> Contrary to appellants' equal protection argument, the fact that the firefighters' rate is based on more hours than typically used for federal employees does not reflect discrimination. The general formula for the regular rate applies equally to all these employees. The different calculations based on this formula merely reflect the employees' different work schedules and compensations.

Id. at 752.

In view of the preceding discussion, Defendant's Motion to Dismiss is granted and Plaintiffs' Motion for Summary Judgment

is denied as to plaintiffs' third and fourth claims.

III.

By way of defense, defendant argued that regardless of the validity of plaintiffs' contentions, they may not recover retroactive overtime payments under the FLSA because in determining plaintiffs' hourly regular rate and overtime rate of pay, their employing agencies relied in good faith upon, and conformed with, specific written instructions issued by OPM, i.e., FPM Letter 551-5, which governs the FLSA in the federal sector. Thus, defendant contended that pursuant to 29 U.S.C. section 259 (1982), defendant was not liable to plaintiffs for any retroactive FLSA overtime pay and, absent the potential for awarding money damages to plaintiffs, this court lacked jurisdiction to hear plaintiffs' claims.

At the outset, the court notes that in light of the disposition of these motions, defendant's argument regarding its good faith defense under 29 U.S.C. section 259 (1982) is academic. However, without discussing the availability of this defense to the government in general, this court notes that it is unavailable to the government given the facts in the instant case.

Section 259 of Title 29, United States Code, provides, in pertinent part:

> (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended...if he pleads and proves

> that the act or omission complained was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation.... Such a defense, i established, shall be a bar to the action or proceeding.

29 U.S.C.section 259 (1982).

Although it is true that plaintiffs prevailed with respect to a limited part its minimum wage claim in the district court and that defendant as "an employer" became "subject to liability" under the FLSA, it was not due to the manner in whi defendant followed FPM Letter 551-5. Rather, it was the application of the GS- Step 1 basic pay to the applicable equations which did not result in payment of the minimum FLSA wages. Therefore, th defense is unavailable to defendant becau

it was not the reliance of FPM Letter 551-5 which resulted in liability, but rather liability was based upon the amount of salary which, when incorporated into the required equations, did not result in the required minimum wage for GS-3, Step 1 firefighters, i.e., the GS grade and step level of Mark T. Jones, one of the plaintiffs in this suit.

Furthermore, in the instant case, defendant did not act "in conformity with" FPM Letter 551-5 which specifically states in Attachment 2 that "[t]he regular rate of pay at which the employee is employed shall in no event be less than the statutory minimum specified under section 6 of the FLSA." It is this non-conformity which resulted in defendant's liability in the district court and which now makes defendant's good faith defense under section 259 unavailable.

CONCLUSION

The court concludes that there is n genuine issue as to any fact material to the question of defendant's liability to plaintiffs because of allegedly erroneou calculations of the amounts of overtime compensation due plaintiffs under the Fa Labor Standards Act. Furthermore, the court concludes that defendant is not liable to the plaintiffs for additional overtime compensation on the grounds stated, and that defendant is entitled t judgment as a matter of law.

Accordingly, the court grants defendant's Motion to Dismiss and denies plaintiff's Motion for Summary Judgment. The clerk of the court is directed to dismiss the Complaint. Costs to defenda

IT IS SO ORDERED.

/s/
MOODY R. TIDWELL
Judge

ENTERED
July 26, 1982
Clerk, U.S. District
Court, Central District
of California

FILED
July 20, 1982
Clerk, U.S. District
Court, Central District
of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODNEY WHEELER, et al.,	
Plaintiffs,	NO. CV 80-4512AWT
v.	
UNITED STATES OF AMERICA, et al.,	MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
Defendants.	

This matter is before the Court on the parties' cross-motions for summary judgment.

Plaintiffs' first, third and fourth causes of action present claims that defendants' method of computing plaintiffs' regular and overtime pay is inconsistent

with 5 U.S.C. 5332, and violative of both section 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. section 207, and the Fifth Amendment to the United States Constitution. Plaintiffs seek both damages and a declaration setting forth the proper method of computing their regular and overtime pay.

Because the amount sought by each plaintiff on the damages claims asserted in these three causes of action exceeds $10,000 and since the recovery is sought against the United States, these claims are within the exclusive jurisdiction of the Court of Claims. Graham v. Henegar, 640 F.2d 732, 734-36 (5th Cir. 1981) (FLSA claim); Huddleston v. Donovan, 524 F. Supp. 179, 180-82 (N.D. Ill. 1981) (Equal Pay Act/FLSA claim); cf. Cape Fox Corp. v. United States, 646 F.2d 399, 401-02 (9th Cir. 1981) (non-FLSA); Rowe v. United States, 633 F.2d 799, 802 (9th Cir. 1980),

cert. denied, 451 U.S. 970 (1981) (same). Accordingly, pursuant to 28 U.S.C. 1406(c), plaintiffs' damage claims relating to these causes of action will be transferred to the Court of Claims. 2/

In their request for a declaratory judgment, plaintiffs seek essentially the same relief sought in the damage claim. It is obvious that the primary relief sought by plaintiffs is monetary damages from the United States. Consequently, so that the exclusive jurisdiction of the Court of Claims over plaintiffs' damage claims will not be undermined, this declaratory relief claim will be dismissed. Cf. Cape Fox, supra, 646 F.2d at 402 (court should refuse to grant declaratory relief where judgment would operate only to determine existence and extent of damage claim within exclusive jurisdiction of Court of Claims); Rowe, supra, 633 F.2d at 802 ("Court of Claims' jurisdiction cannot be avoided by a

complaint that appears to seek only equitable relief when the 'real effort of the complaining party is to obtain money [in excess of $10,000] from the federal government'." (Quoting Bakersfield City School Dist. v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979)) (brackets in the original)); cf. Geni-Chlor Int'l v. Multisonics Dev. Corp., 580 F.2d 981, 985 (9th Cir. 1978) (court has discretion to decline to grant declaratory relief).

On the second cause of action, brought under the minimum wage provisions of the FLSA, 29 U.S.C.section 206, less than $10,000 is sought by each plaintiff. Therefore, this Court has concurrent jurisdiction with the Court of Claims, pursuant to 28 U.S.C. section 1346(a) (2) and 16(b) of the FLSA, 29 U.S.C. section 216(b). The parties are in agreement that 6 of the FLSA, 29 U.S.C. section 206, which prohibits employers involved in interstate

commerce from paying wages less than a specified hourly rate, applies to defendants. See 29 U.S.C. section 203(d), (e) (2) (A) & (x).

The Court concludes that plaintiffs' wages, for purposes of section 6 of the Act, should be regarded as the hourly rate obtained by dividing each plaintiff's total compensation for the work period (including standby duty pay, but excluding pay received as an overtime premium) by the total number of hours actually worked during that period. 3/ By the uncontroverted evidence in the record, it appears that defendants have been compensating at least some of the plaintiffs at an hourly rate, as computed above, less than the minimum prescribed in section 6. Accordingly, plaintiffs are entitled to a declaratory judgment that the defendants are acting in violation of 6, 29 U.S.C. section 206, and to an accounting from the

defendants setting forth the amount by which the wages paid to each plaintiff (as computed above) have fallen short of the minimum wage requirements of that section.

For the foregoing reasons, IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is granted with respect to the second cause of action, but is denied with respect to the first, third and fourth causes of action.

2. The first, third and fourth causes of action are transferred to the Court of Claims, 28 U.S.C. section 1406(c), insofar as damages and an accounting are sought and are dismissed insofar as declaratory relief is sought.

3. Defendarts' motion for summary judgment is denied, the denial being without prejudice with respect to the

first, third and fourth causes of action.

Dated: July 19, 1987

/s/
A. WALLACE TASHIMA
United States
District Judge

FOOTNOTES

There are now approximately 1,200 plaintiffs--all federal firefighters--who have "opted-in" under FLSA procedures. 29 U.S.C. section 216(b).

Plaintiffs have also asked for an accounting with respect to these damage claims. The Court of Claims has jurisdiction to provide this relief as an incident to resolution of the damages issues. Rowe, supra, 633 F.2d at 802 (dictum); Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1315 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979) (dictum).

The Court's determination of meaning of the term "wage" in section 6 of the Act, as applied to these plaintiffs, reflects no opinion on the appropriate construction of the term "regular rate" for purposes of the overtime provisions set forth in section 7 of the Act, 29 U.S.C. section 207.

ENTERED
July 26, 1982
Clerk, U.S. District Court
Central District of California

FILED
July 20, 1982
Clerk, U.S. District Court
Central District of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RODNEY WHEELER, et al., Plaintiffs,	NO. CV 80-4512 AWT
v.	ORDER OF PARTIAL SUMMARY JUDGMENT AND FOR FURTHER PROCEEDINGS
UNITED STATES OF AMERICA, et al., Defendnats.	

In accordance with the Court's Memorandum Decision signed and filed concurrently herewith,

IT IS ORDERED:

1. Defendants have failed to comply with their statutory duty to compensate

plaintiffs at an hourly rate at least equivalent to the minimum wage prescribed by 29 U.S.C. section 206.

2. The proper method for computing plaintiffs' wages, so as to ensure compliance with 29 U.S.C. section 206, is specified in Federal Personnel Manual ("FPM") Letter 551-5 (January 15, 1975), which requires that the "regular rate" (as computed therein) at which employees such as plaintiffs are compensated "should in no event be less than the statutory minimum wage specified under Section 6 of the FLSA [Fair Labor Standards Act, 29 U.S.C. section 201, et seq.]" FPM Letter 551-5, attachment 2, p. 5.

3. Plaintiffs are entitled to an accounting, in accordance with the foregoing.

4. Counsel shall meet within 45 days in a good faith attempt to:

(a) Identify each plaintiff who has a minimum wage claim.

(b) Agree upon the amount due to make each such plaintiff whole.

(c) Enter into a complete or partial stipulation of facts pertinent to the accounting and damages issue.

5. Counsel shall file a Joint Status Report within 60 days setting forth each of the items specified in paragraph 4, above, and as required in Local Rule 9.3.2.

6. A Status Conference is set in this matter on September 27, 1982, at 1:30 p.m. in Courtroom No. 6.

Dated: July 19, 1982

/s/
A. WALLACE TASHIMA
United States
District Judge

ENTERED
Sep 19 1983
Clerk US District Court
Central District
of California

FILED
Sep 16 1983
Clerk US District Court
Central District
of California

United States District Court
Central District of California

RODNEY WHEELER, et al.,	)	
	)	
Plaintiffs,	)	NO. CV
	)	80-4512AWT
v.	)	
	)	JUDGMENT
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

In accordance with the Memorandum Order On Motion to Confirm Accounting, signed and filed concurrently herewith, there being no controverted issue of fac

IT IS ORDERED AND ADJUDGED that each plaintiff named in Exhibit "A" hereto recover of defendants the amount opposite said plaintiff's name under the column headed "Total Damages", together with a reasonable attorney's fee of $13,354.38 and costs of $34.00. Attorney's fees and costs are awarded to all 56 plaintiffs in the aggregate.

IT IS FURTHER ORDERED AND ADJUDGED that as to all remaining plaintiffs in this action, EXCEPT the 14 plaintiffs whose names appear on Exhibit "B" hereto, this action (i.e., the minimum wage claim) is dismissed on the merits.

The Court expressly determines that there is no just reason for delay and expressly directs the entry of this judgment.

In accordance with the provisions of 28 U.S.C. 1961(a), this judgment shall bear

interest at the rate of 10.58 percent per annum.

Dated: Sep 15 1983

/s/
A. WALLACE TASHIMA
United States District Judge

ENTERED
Sep 19 1983
Clerk US District Court
Central District of
California

FILED
Sep 16 1983
Clerk US District Court
Central District of
California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODNEY WHEELER, et al.,	)	
	)	
Plaintiffs,	)	NO. CV
v.	)	80-4512AWT
	)	
UNITED STATES OF AMERICA, et al.,	)	MEMORANDUM ORDER ON MOTION TO
Defendants.	)	CONFIRM ACCOUNTING

Pursuant to the granting of summary judgment on liability for underpayment of minimum wages, the parties were directed, on July 20, 1982, to attempt to reach agreement on the amount of actual damages due each plaintiff. After 14 months, agreement has been reached on 56 plaintiffs. As to those plaintiffs, because there is no controverted issue of

fact as to the amount of actual damages, i.e., the parties agree on the amount of underpayment, judgment shall be entered as to each of them. In addition, for the reason set forth below, I award to each plaintiff liquidated damages in the amount of actual damages. Each plaintiff to whom judgment is awarded at this time, and the amounts of his actual and total damages, are set forth in Exhibit "A" hereto. Because actual damages are, in fact, wages, the amount of actual damages as to each plaintiff shall be subject to such withholding, deductions and checkoffs as would any other wages payable to said plaintiff.

Liquidated Damages

The Fair Labor Standards Act ("FLSA") provides for liquidated or double damages in a minimum wage case. 29 U.S.C. section 216(b). Under a 1947 amendment to the Act,

the award of such damages is left to the sound
discretion of the court. 29 U.S.C. section 260. The court may, as a discretionary matter, not award liquidated damages if the employer's violation "was in good faith" and based on "reasonable grounds for believing" that the employer was acting in conformity with the Act. Id. It is clear, however, from the statutory language that such a showing of good faith does not require remission of liquidated damages as a matter of right, but only allows the court to exercise its discretion not to award liquidated damages. Thompson v. Sawyer, 678 F.2d 257, 282 (D.C. Cir. 1982).

Here, defendant contends that it was acting in good faith and that its violation was based on a "reasonable" error in not keeping the government's computerized pay program properly and timely inputted with current pay data. According to the

government, "the fine tuning of the computer programming necessary to implement that directive [FPM 551-5 on calculating the regular rate of pay of firefighters] can cause problems which even the best of programmers cannot prevent."

The Court accepts the factual matters set forth in Commander Habermann's declaration as true. Even on that basis, however, the Court cannot agree that liquidated damages should not be awarded because there is no showing that there existed "objectively reasonable grounds for believing that their [defendants'] actions complied with the statute." Id. Moreover, I agree with plaintiffs that the government should be held to a high standard of care in its own compliance with the FLSA's minimum wage provisions. It is, after all, charged with the enforcement of the Act. As the largest employer in the nation, it has the resources to fully comply with the

Act. As a matter of discretion, therefore, I conclude that plaintiffs should be awarded full liquidated damages.

Having determined that liquidated damages are proper, although plaintiffs request the same, prejudgment interest is not recoverable in addition thereto. Holtville Alfalfa Mills v. Wyatt, 230 F.2d 398, 401 n.2 (9th Cir. 1955).

Attorney's Fees

The 56 plaintiffs in whose favor judgment is to be entered are prevailing parties and entitled to an award of reasonable attorney's fees under 29 U.S.C. section 216(b). Plaintiffs seek $1,030.13 in fees. The Ninth Circuit has recently held that determination of the amount of attorney's fees in an FLSA case is to be guided by the 12-factor test adopted in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). Bonnette v. California

Health and Welfare Agency, 704 F.2d 1465, 1473 (9th Cir. 1983). In addition, that determination must be informed by the standards set forth in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), particularly with respect to the extent of plaintiffs' success. Although Hensley involved an award under 42 U.S.C. section 1988, its holding is "applicable in all cases in which Congress has authorized an award of fees to a prevailing party." Id. at 1939 n. 7.

Defendants do not challenge the reasonableness of the hourly rates claimed nor that the hours shown were actually expended. The issues are the extent of plaintiffs' success and the reasonableness or necessity in doing the work claimed.

Several factors enter into the resolution of these issues. The complaint originally encompassed four causes of action and, ultimately, approximately 1,400

plaintiffs were joined under the FLSA's opt-in provisions. As defendants have pointed out, time billings in this case commenced to accrue two years before suit was filed. By the Memorandum Decision and Order, filed on July 20,1982, three of the four causes of action were either dismissed or transferred to the then Court of Claims. The transferred claims include those challenging defendants' method of computing regular and overtime pay. It is apparent that these claims involve far greater monetary amounts than the minimum wage claim.

It should also be noted that of the approximately 1,400 plaintiffs in this case, only 62 have established that some amount is owed to them for underpayment of the minimum wage. Even if the remaining eight plaintiffs whose minimum wage claim in any amount is contested are included, these 70 constitute only five percent of

all the plaintiffs. Therefore, the administrative burdens of managing this lawsuit must be attributed to the other claims. While it is true that the judgment may have wider effect beyond the 70 plaintiffs, no "class-wide" relief, injunctive or otherwise, has issued. If, as plaintiffs represent, other actions will be filed for continued failure of defendants to comply with the firefighters' minimum wage requirements, I must assume that appropriate attorney's fees will be awarded in any subsequent suit.

Because of the somewhat cryptic nature of the time notes submitted in support of the fee request, see id. at 1943 (Burger, C.J., concurring), it is difficult to ascertain exactly how much work prior to July 20, 1982, was done on the minimum wage claim, as opposed to the transferred or dismissed claim or on all claims. This also gives credence to defendants'

contention that work done as long as two years before commencement of the action appears to be unnecessary and possibly not reasonably related to the preparation of the complaint.

In summary, plaintiffs have prevailed in this Court on only one of four claims. At most only 70 of the 1,400 plaintiffs have prevailed on the minimum wage claim. The Court does take into account, however, the potential general impact of the judgment here in measuring plaintiff's success. How the time incurred prior to summary judgment should be split between the different claims is a matter of judgment, because of the lack of detailed record-keeping, as is the question of how much of the pre-filing time was reasonably necessary. Finally, I should note that plaintiffs' claim appears to contain $400 of "double-billing". That is because the original application included "an estimate

of $400 for services to be rendered...after the...declaration." The supplemental declaration indicates that since the hearing an additional $722.50 in fees have been incurred. Since the declaration is silent on the subject, I assume that no credit is reflected for the $400 estimate of future billings. Therefore, plaintiffs total claim of $41,030.13 should be reduced by $400 to $40,630.13.

Taking all of the foregoing factors into account, it is my judgment that one-third of the amount claimed, or $13,354.38, is a reasonable attorney's fee in this case and I so find. In making this finding, I have considered all of the 12 factors set forth in Kerr, although each is not separately discussed in detail. Manhart v. City of Los Angeles Dep't of Water & Power, 652 F.2d 908 (9th Cir. 1981). Needless to say, this determination of reasonable attorneys' fees for the 56

plaintiffs who have prevailed on their minimum wage claim in this Court is not intended as any indication of the amount of attorney's fees to which plaintiffs may be entitled on the claims transferred to this Court of Claims, should plaintiffs prevail there. Neither is this determination intended to foreclose any future award of fees incurred after this date with respect to the remaining 14 plaintiffs should they eventually prevail.

Plaintiffs are also awarded, without objection, costs of $34.00.

Further Proceedings

With respect to the remaining 14 plaintiffs, the government disagrees as to the amount of underpayment involved or contends that no amount may be payable. Because the issue is controverted, judgment cannot be entered as to these plaintiffs without trial. Given the amounts involved, it is unfortunate that the parties are

unable to agree on the single issue remaining as to these 14 plaintiffs. The differences between the parties hardly justify the time, expense and additional attorney's fees involved. However, the government, as any other party, is entitle to go to trial on controverted issues of fact.

The claim of the 14 plaintiffs listed on Exhibit "B" are set for trial on Januar 3, 1984, at 9:30 a.m., on the following schedule and in accordance with the following procedures:

1. The direct testimony of all witnesses shall be presented by declaration. All documents to be presente in connection with each such witness shall be attached to the declaration. All such trial declarations shall be filed and served by November 1, 1983.

2. Each party shall notify the other on or before November 15, 1983, of the

adverse witnesses which he or it desires to be available for cross-examination. All such witnesses shall (a) either be present at the trial or (b) made available for deposition not later than December 15, 1983 if the witness resides more than 100 miles from Los Angeles or for other cause, see Fed. R. Civ. P. 32(a)(3), cannot attend the trial. Each declaration submitted under paragraph 1 shall specify whether the witness will be present for trial, if requested, under subparagraph (a) or whether the witness qualifies under subparagraph (b).

3. All depositions intended for use at trial shall be marked in accordance with Local Rule 9.6.9 and lodged with the clerk at least five days before trial.

4. Except for good cause shown, no witness, document or deposition not conforming to paragraphs 1-3 shall be allowed into evidence.

5. The amount, if any, by which each plaintiff was underpaid the minimum wage is the only issue to be tried. The ruling set forth earlier in this memorandum order regarding liquidated damages applies, as well, to these remaining claims since all plaintiffs are similarly situated.

6. The issue of attorney's fees incurred after this date as to the remaining 14 plaintiffs is reserved until after trial or other disposition of the remaining claims.

Dated: SEP 15 1983

/s/
A. WALLACE TASHIMA
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

RODNEY WHEELER, ET AL., NO. 86-1043

Plaintiffs-Appellants,

vs.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT

in case No(s). 528-82C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

DATED: September 18, 1986

ENTERED BY ORDER OF THE COURT

/s/
FRANCIS X. GINDHART, CLERK

ISSUED AS A MANDATE: October 9, 1986

TDW57

APPENDIX "D"

ROBERT I ABBEY, CHARLES ABRUZZO, KEITH F ACHOFF, RUDY A ACOSTA, EDWARD J ADAIR, FIDEL L G ADAMOS, DAVID F ADAMS, DAYLE M ADAMS, JAMMIE W ADAMS, RANDY R ADAMS, RICHARD G ADAMS, JOHN C AFLLEJE, THOMAS D AGUON, JAMES AHRENS, WAYNE D ALAMEDA, ARTHUR J ALBERICO, CAESAR A ALCANTARA, SANTIAGO B ALCAZAR, VILLAMOR A ALEGRE, DAVID ALLAN, DAVID H ALLEN, GEORGE W ALLEN, JOHN E ALLEN, KURT L ALLEN, MICHAEL ALLEN, MONTE Q ALLEN,WILLIE J ALLMON, GLEN R ALSTON, MITCHELL ALTHOF, WALLACE E ALTMAN, EDGAR H ALVAREZ, DANIEL E AMES, DILLARD R AMES, CLARENCE JAMES AMEY, JAMES A ANCHETA, ALAN G ANDERSON, DAHL K ANDERSON, JAMES ANDERSON, JAMES H ANDERSON, RAY C ANDERSON, THOMAS R ANDERSON, MARK C ANDREASSEN, JOSE T ANGOCO, ROBERT F ANON, GREG C ANTHON, PARTICK O ANTRY, ROBERT W APPLEGATE, LOREN ARCHULETA, HERBERT H ARDEN, DANIEL A ARDOIN, RANDALL J ARFT, STEVEN M

ARGUELLO, MICHAEL R ARMSTRONG, EMERSO
ARNETT JR, JAMES ARNOLD, JAMES ASHLEY
WILLIS G ASHLEY, EZRA M ATHAY, LAVAU
L ATKERSON, W J ATKINSON, ALBERT S
ATOIGUE, PIO P ATOIGUE, THOMAS AVANT,
PHILIP AVERY, JOSEPH D AVILA, R AVILA,
JAMES A AYERS, LUIS B BABAUTA, ERIC G
BABCOCK, LAWRENCE BACH, DAVID B BAILEY
JERRY K BAILEY, RONALD E BAILEY, HARVE
BAILS, WILLIAM T BAIRD JR, A C BAKER J
A W BAKER, DONALD R BAKER, RICHARD E
BAKER, THOMAS S BAKER, WILLARD BAKER,
RAYMOND K BALAI, GENE W BALCH, ALVIN
BALDWIN, KENNETH J BALDWIN, LAVERNE C
BALDWIN, WILLIAM L BALDWIN, JOHN BALES
JAMES E BALL, JOHN M BALLARD, STEPHAN
BALLARD, FRANK T BALSY, RICHARD G BAND
MICHAEL J BANNON, ALLAN BANTLE, JOSE M
BARAJAS, FRANK C BARBER SR, J C BARBRE
JAMES BARGA, LUCKY G BARNES, DAVID W
BARNHART, DARRELL A BARR, JAMES D BARR
R S BARR, JESUS BARRAGAN, VICENTE

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No. 86-1000

In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY WHEELER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that the formula established by the Office of Personnel Management's predecessor for determining the Fair Labor Standards Act overtime pay rates of federal firefighters complies with the requirements of that Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is unreported. The opinion of the United States Claims Court (Pet. App. B1-B30) is reported at 9 Cl. Ct. 579.

JURISDICTION

The final order of the court of appeals was entered on September 18, 1986. The petition for a writ of certiorari was filed on December 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT

The federal government, as employer, became subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, in 1974. The FLSA provides that an employee covered by the FLSA must receive overtime pay for all hours of work in excess of 40 hours per week "at a rate not less than one and one-half times the regular rate at

which he is employed." 29 U.S.C. 207(a)(1). In recognition of the fact that firefighters typically do not work a 40-hour week but, rather, generally are required both to perform work and to remain at their duty stations on standby during their work shifts, the 1974 amendments to the FLSA enacted a special overtime pay provision applicable to firefighters. That provision, 29 U.S.C. 207(k), states that firefighters should receive overtime pay for the hours they are on duty in excess of 216 hours in a 28-day period.[1]

Congress instructed the Civil Service Commission, predecessor to the Office of Personnel Management (OPM), to apply the FLSA in the federal sector consistently with its application by the Department of Labor in other sectors. H.R. Rep. 93-913, 93d Cong., 2d Sess. 28 (1974). In January 1975 the Commission issued Federal Personnel Manual (FPM) Letter No. 551-5 (Jan. 15, 1975), which provided instructions for applying the FLSA to federal firefighters. Because FLSA overtime pay is to be paid at the rate of one and one-half times the regular rate of pay, which the FLSA defines as "includ[ing] all remuneration for employment paid to, or on behalf of, the employee" (29 U.S.C. 207(e)), it was necessary for the Commission to establish a formula for computing firefighters' regular rate of pay. FPM Letter No. 551-5 instructed that firefighters' regular rate of pay is their General Schedule (GS) pay ("basic pay") plus the standby duty pay they receive pursuant to 5 U.S.C. 5545(c)(1) ("standby pay") during a work period divided by the number of hours per work period that the firefighter is

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[1]Section 207(k) also directed the Secretary of Labor to perform a study to determine the average number of hours worked by firefighters. The Secretary's study determined that firefighters averaged 212 hours of work per 28-day period in 1975. 48 Fed. Reg. 40518-40519 (1983). Accordingly, under the terms of the statute, federal firefighters are now entitled to overtime pay for all hours that they are on duty in excess of 212 hours in 28 days.

regularly on duty. For example, as the Claims Court explained (Pet . App. B16), the regular rate of pay for a GS-4, step 6 firefighter like petitioner Wheeler, who in 1980 received $451.20 in basic pay and $100.80 in standby pay for a two-week period, during which he was regularly scheduled to be on duty for 144 hours, was $3.83 per hour (($451.20 basic pay + $100.80 standby pay) / 144 hours). This formula is consistent with the Department of Labor's regulations, which provide that the regular hourly rate is to be determined "by dividing [the] total remuneration for employment (except statutory exclusions) in any work [period] by the total number of hours actually worked * * * in that work [period] for which such compensation was paid." 29 C.F.R. 778.109; see *Zumerling* v. *Devine*, 769 F.2d 745, 752 (Fed. Cir. 1985).

Under the instructions in FPM Letter No. 551-5, the amount of overtime pay due a firefighter is determined by multiplying half the regular rate by the number of overtime hours. Under this approach, the Claims Court explained (Pet. App. B17), petitioner Wheeler, who regularly was scheduled for 36 hours of overtime duty (144 hours - 108 hours = 36 hours) during a two-week period (see Pet. App. B19),[2] was entitled to $69 of overtime pay for that period (1/2 x $3.83 x 36 hours). Accordingly, he received $621 for each two-week period ($451.20 basic pay + $100.80 standby pay + $69 overtime pay) (Pet. App. B18).[3]

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[2]As the Claims Court noted (Pet. App. B16 n.5), as a result of a study by the Department of Labor firefighters are entitled to overtime pay for hours of duty in excess of 106 hours in a two-week period rather than for hours of duty in excess of 108. However, because the court used 108 in its calculations pertaining to petitioner Wheeler (see Pet. App. B17), we do also.

[3]In effect, the $621 received by petitioner Wheeler during a two-week period represents approximately $414 for 108 hours at his regular rate of $3.83 and $207 for 36 hours of overtime at the rate of $5.75 ($3.83 + (1/2 x $3.83)).

In *Zumerling* v. *Devine*, *supra*, the Federal Circuit upheld the calculation method set forth in FPM Letter No. 551-5. It rejected the contention that the regular rate of pay should be calculated based on the number of non-overtime hours worked rather than the total number of hours worked, concluding that "it appears reasonable that the regular rate is to indicate the typical hourly wage paid, and OPM's equation merely reflects this fact" (769 F.2d at 751). It also rejected the contention that FPM Letter No. 551-5 conflicts with the statute because it provides that the amount of overtime pay should be calculated by multiplying half the regular rate times the number of overtime hours of duty. The court explained that "[b]y receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed" for overtime work (769 F.2d at 752).

Petitioners are federal firefighters who raise the same contentions that the Federal Circuit rejected in *Zumerling* (see Pet. 12). The Claims Court recognized that the Federal Circuit had already decided this issue (Pet. App. B22) and rejected their challenge to the calculation method set forth in FPM Letter No. 551-5. The Federal Circuit affirmed by order, noting that the case was indistinguishable from *Zumerling* (Pet. App. A2).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. As the Federal Circuit recognized in *Zumerling*, the method set forth in FPM Letter No. 551-5 for calculating the overtime pay due firefighters is correct. The amount of basic pay due federal firefighters is determined by their GS level and the amount of their standby pay is determined by 5 U.S.C. 5545(c)(1), and petitioners do not disagree that

those amounts should be added in calculating a firefighter's regular rate of pay. Petitioners contend (Pet. 12) that OPM's predecessor erred by determining that to calculate the regular rate of pay the divisor should be the total number of hours of duty in a work period; in petitioners' view the divisor should be the number of non-overtime hours worked during the work period. Petitioners also contend (*ibid.*) that, rather than multiplying the regular rate by one-half and multiplying that by the number of overtime hours worked, the number of overtime hours worked should be multiplied by one and one-half times the regular rate to determine the amount of overtime pay due.

Petitioners' contentions are wrong. Rather than resulting in an accurate calculation of the amount of overtime pay due, their proposed method would result in a windfall to firefighters. First, the proper starting point for determining how the FLSA should affect federal firefighters is to calculate what the firefighters' actual hourly rate of pay was prior to the application of the FLSA. Dividing the pay the firefighter then received by the total number of hours of duty for which that pay was received, as FPM Letter No. 551-5 requires, is a perfectly straightforward way of determining the regular rate of pay that accurately reflects what federal firefighters earned per hour prior to the application of the FLSA to the federal government. It is also consistent with the Department of Labor's regulations. 29 C.F.R. 778.109. Second, multiplying the regular rate of pay by one-half and then multiplying that by the number of overtime hours worked plainly results in pay at the rate of one and one-half times the regular rate for overtime hours worked. The method devised by OPM's predecessor thus accurately gives effect to Congress's purposes in applying the FLSA to the federal government. Under the calculation method set forth in FPM Letter No. 551-5, federal firefighters' wages are increased so that they are paid at the rate of one and

one-half times the regular rate for the overtime hours they work.[4]

In contrast, petitioner's proposed method of dividing the basic pay plus the standby pay by the number of non-overtime hours worked to determine the regular rate does not accurately reflect the typical hourly wage earned by federal firefighters prior to the application of the FLSA to the federal government, but instead artificially inflates the average hourly wage. Under petitioners' proposal, a federal firefighter such as Wheeler would be treated as if, absent the FLSA, he had earned $5.11 per hour for the 108 hours of non-overtime worked each pay period (($451.20 basic pay + $100.80 standby pay) / 108 hours) and nothing for the additional 36 hours normally worked (see Pet. App. B20). That is surely not an accurate reflection of how he was paid. It was devised merely because the use of an inflated regular rate would result in approximately $212.21 extra every two weeks for employees such as petitioner Wheeler compared with the formula set out in FPM Letter No. 551-5 (see Pet. App. B20-B21). Under petitioners' proposal, rather than receiving one and one-half times their pre-FLSA hourly rate for each hour in excess of 108 hours of duty every two

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[4]The point can be illustrated by the example of an employee who worked 50 hours per week before the FLSA became applicable to him and who, after the FLSA became applicable, continued to work 50 hours per week, of which 40 hours are deemed (by the FLSA) to be regular time and ten hours are overtime. If the employee's pre-FLSA weekly salary was $200 per week, then he clearly was paid at the rate of $4 per hour. After application of the FLSA, he would have to be paid at the overtime rate of one and one-half times the regular rate for the hours worked in excess of 40 hours per week. Thus, after application of the FLSA, he would be paid $4 per hour for 40 hours and $6 per hour (1-1/2 x $4) for 10 hours, for a total of $220. That could also be calculated, under the formula provided in FPM Letter No. 551-5, as the regular rate times the total number of hours worked ($4 per hour x 50 hours) plus one-half the regular rate times the number of overtime hours worked ($2 x 10 hours).

weeks, petitioners would receive (a) more pay for each regular hour than they received before the FLSA applied, and (b) one and one-half times that enhanced amount for each overtime hour. But the FLSA does *not* require (as petitioners' formula would imply) that a firefighter who previously was on duty for 144 hours and received $552 is now entitled to receive $552 for 108 hours of duty; all it entitles them to is the pre-FLSA hourly wage plus one-half again for each hour of duty over 108.[5]

Even if the calculation method set forth in FPM Letter No. 551-5 were not plainly correct, it would warrant deference as "a contemporaneous construction of [an] Act by the officials charged with the responsibility of setting its machinery in motion" (*Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410 (1975); accord, *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (concerning the validity of a long-standing OPM regulation interpreting a federal pay statute)). FPM Letter No. 551-5 is a comprehensive document, covering all aspects of the entitlements of federal employees engaged in fire protection activities to overtime pay under the FLSA, that was issued at virtually the same time federal firefighters became subject to the FLSA. The Federal Circuit recognized that OPM's predecessor gave careful consideration to the statutory objectives of providing fair and reasonable compensation to federal firefighters,

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[5]To use the hypothetical example presented in note 4, *supra*, petitioners would say that the employee in that example earned $5 per hour for 40 hours per week prior to the application of the FLSA and nothing for the additional 10 hours regularly worked. Under petitioners' proposal, after application of the FLSA, that employee should receive $200 for working a 40-hour week and be paid at the rate of $7.50 per hour for any additional work. Thus, if the employee worked a 50-hour week, he would receive $275 ($200 + ($7.50 x 10)). The flaw in that approach is that, prior to the application of the FLSA, the employee did not earn $5 per hour, but instead clearly earned $4 per hour.

concluding that "OPM's interpretive guidelines 'harmonize[s] with the statute's "origin and purpose," ' " as well as with the Secretary of Labor's regulations. *Zumerling*, 769 F.2d at 750 (brackets in original) (quoting *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)). The court of appeals in *Zumerling* further noted (769 F.2d at 753): "By promulgating the guidelines at issue in this case, OPM has met the challenge given it by Congress. It has administered the FLSA in a most difficult situation and has done so consistent with the Secretary of Labor's regulations."

2. Contrary to petitioners' contention (Pet. 15-17), the court of appeals' decision does not conflict with this Court's decisions in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945), and *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944). Neither of those cases involved firefighters. While the Court in those cases stated that "the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed" (*Youngerman*, 325 U.S. at 424 (citing *Helmerich*, 323 U.S. at 40)), it also recognized that not every employee is employed for 40 hours per week at a particular rate per hour. Thus, as to the employees in *Youngerman* who were employed on a piece-work basis, the Court held that the regular rate "coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked." 325 U.S. at 424 (citing *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 580 (1942)). The formula at issue instructs federal agencies to compute firefighters' regular rates in exactly the same manner.

Nor does the Federal Circuit's decision conflict with the Ninth Circuit's decision in *Oliver* v. *Mercy Medical Center, Inc.*, 695 F.2d 379 (1982), as petitioners also allege (Pet. 13-14). That case did not involve firefighters, but instead

involved an employee who worked for less than six weeks as an ambulance attendant (695 F.2d at 380). He contended that his salary was intended to cover a 40-hour workweek and that he was entitled to overtime pay for the additional hours that he was on call. His employer contended, to the contrary, that his salary was intended to compensate him for all hours that he worked or was on call. The court accepted the plaintiff's theory. While noting that arrangements such as the one the employer alleged are permissible under the Department of Labor's FLSA regulations, specifically 29 C.F.R. 778.114(a), it added that such arrangements are permissible only when there was a "clear mutual understanding," and it found no such understanding in that case (695 F.2d at 381 & n.4). The decision in *Oliver* thus turned on the Department of Labor's FLSA regulations and the intentions of the parties. The Department's FLSA regulations are not applicable here and the applicable instruction, FPM Letter No. 551-5, contains no requirement of a "clear mutual understanding" regarding firefighters' pay. The reason for that difference is obvious and reasonable. Federal firefighters such as petitioners do not bargain over their wages, which are instead established by statutes and regulations, so no mutual understanding is relevant. Moreover, the employer in *Oliver* attempted to rely after the fact on the Department of Labor's regulation authorizing the payment of a fixed salary for all hours worked when the parties agreed to such an arrangement, and it is not surprising that the court rejected that post hoc rationalization. This case involves no such post hoc rationalization. Rather, OPM's predecessor issued FPM Letter No. 551-5 detailing the procedure for determining the overtime pay of federal firefighters only 14 days after the FLSA became applicable to federal workers and long before this litigation ensued.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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